No. 2783.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna Schutt,
Appellants,

vs.

J. H. Merriam, Eugene Wellke, Alma J. Schmidt, Amanda Katzung, Minnie S. Farnsworth, Corrine Loveland and Don Ferguson,
Appellees.

OPENING BRIEF OF APPELLANTS.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

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STATEMENT OF THE CASE.

This is an action on the part of the plaintiffs and appellants for an accounting on the part of the defendants for certain property belonging to the estates of Ferdinand Fensky and Jeanette Fensky, deceased, alleged to have been acquired by the defendants through various fraudulent acts perpetrated by them and by the said Jeanette Fensky, deceased, and others, and to be wrongfully withheld by them from the plaintiffs, who claim to be the lawful heirs of the said Ferdinand Fensky and of the said Jeanette Fensky.

The allegations contained in the complaint are in effect as follows:

That the plaintiffs Louisa Pickens and Johanna Schutt are, and have been for many years, residents and citizens, respectively, of the states of Kansas and Nebraska, and that they are sisters of Ferdinand Fensky, deceased.

That the said Ferdinand Fensy died intestate in the county of Los Angeles, state of California, on August 7th, 1903, leaving property in California, and in Topeka, Kansas, consisting of real property described in the complaint located in the counties of Los Angeles and Orange, state of California, and personal property consisting of notes and contracts for the sale of real property located in Topeka, Shawnee county, Kansas, cash in bank and in the hands of agents amounting to about $10,000, and that the entire property belonging to Ferdinand Fensky at the time of his death was worth about $100,000.

That at the time of the death of Ferdinand Fensky various persons in the state of Kansas were indebted to him on account of purchase money on real estate sold by him to said persons under the said contracts before mentioned, whereby he agreed to convey the real estate when the purchase price named in the contract was fully paid, and that at the time of his death there was unpaid a large amount under such contracts. That prior to his death the said Ferdinand Fensky and Jeanette Fensky executed deeds to contract purchasers but did not deliver the same.

That in October, 1903, Jeanette Fensky was appointed by the Superior Court of the county of Los

Angeles, state of California, administratrix of the estate of Ferdinand Fensky, and that one M. T. Campbell, then residing at Topeka, Kansas, the agent and representative of the said Jeanette Fensky, was, on October 22nd, 1903, appointed administrator of the estate of the said Ferdinand Fensky by the probate court at Shawnee county, Kansas.

That after the appointment of the said Jeanette Fensky as administratrix, she came into possession of said promissory notes and cash in excess of $5000 and of said real estate, and with the intent of deceiving and defrauding the plaintiffs and other heirs of Ferdinand Fensky, she caused the California real estate to be appraised and inventoried in the total sum of $6000, and the personal property in the sum of $400, and purposely failed to list and inventory the cash and other personal property in her possession belonging to the said estate, and also omitted to inventory a large portion of the real property belonging to the said estate, and filed the said false inventory and appraisement.

That the said M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, filed in the county of Shawnee, state of Kansas, an inventory purporting to contain all the property coming into his hands as administrator of such estate, but purposely omitting from said inventory many of the notes and other personal property belonging thereto.

That the said Jeanette Fensky and M. T. Campbell entered into a fraudulent and collusive agreement for the purpose of defrauding these plaintiffs and procur-

ing from them their said interest in the estate of said Ferdinand Fensky without adequate consideration.

That pursuant to said scheme to defraud plaintiffs, said Campbell omitted from his said inventory any reference to any indebtedness due the said estate from purchasers of real property and listed the said real property as a portion of the estate of Ferdinand Fensky for the reason that the laws of the state of Kansas provided that real estate of an intestate husband dying without children descends directly to his widow, and no part of the same descends to the next of kin, and that the said Campbell concealed the indebtedness due the said estate from the purchasers of said property.

That thereafter the said Jeanette Fensky delivered the deeds executed by the said Ferdinand Fensky in his lifetime to the said property to the said purchasers and received the money thereon due the estate of Ferdinand Fensky, or took mortgages back payable to herself, but did not cause the said money to be paid to the administrator of the said estate of Ferdinand Fensky, said M. T. Campbell, but converted the same to her own use and benefit; nor did she ever account to the estate of said Ferdinand Fensky for the said mortgages.

That by means of the said false inventories filed in the estate of Ferdinand Fensky, deceased, in the states of California and Kansas, as aforesaid, and by false statements to these plaintiffs, the said Jeanette Fensky and the said Campbell represented that the estate of said Ferdinand Fensky consisted only of property in California of the value of about $6000 and property

in the hands of Campbell amounting to about $20,000, when in truth and in fact, the California real estate owned by the said intestate at the time of his death was worth about $30,000 and the personal property in the hands of the said Jeanette Fensky was of the value of more than $50,000, and the personal property, including that which the said Jeanette Fensky had turned over to the said Campbell, in the state of Kansas, was of the actual value of over $60,000.

That the said Campbell further represented to these plaintiffs that it would take a long time to close up the estate of Ferdinand Fensky; that many of the notes inventoried were of little and doubtful value, and that the cost of administration would amount to a considerable sum and that the amount that each of the plaintiffs might be entitled would not exceed the sum of $1000; that the real estate in the state of Kansas belonging to the intestate all went to the widow and all the property left by the intestate was community property, and that if they wanted their share, the said Jeanette Fensky would buy their said share for $1000 each.

That all of which statements were false and made for the purpose of inducing these plaintiffs to accept the proposition of the said Jeanette Fensky for the purchase of their interest in the said estate; that each of said complainants was entitled to more than $8000 from said estate.

That at the time the said representations were made neither of the plaintiffs had any knowledge of the actual facts as set out in the complaint, but relied upon the inventories filed in the said estate, and the

representations so made to them, and believing the same to be true, accepted the sum of $1000 each from the said Jeanette Fensky and executed to her releases and quitclaim deeds conveying to her all their right, title and interest in the said estate of their said deceased brother, Ferdinand Fensky.

That the said sum of $1000 so paid to each of them was paid out of funds in the hands of the said Jeanette Fensky and the said Campbell belonging to the said estate of Ferdinand Fensky.

That the said Jeanette Fensky died in Los Angeles, California, July 8th, 1908. At the time of her death she was the owner of certain real estate described in the complaint and that all of the same had been purchased by her with money derived from the estate of Ferdinand Fensky.

That prior to her death the said Jeanette Fensky executed deeds to the said real estate to certain and various defendants in this action, but that the said deeds were not delivered to the various grantees until after her said death.

That after the death of Jeanette Fensky the defendant J. H. Merriam, of Los Angeles, state of California, was appointed as administrator of her estate. That said J. H. Merriam filed an inventory in which it appears that the total assets of the said estate of Jeanette Fensky amounted to about $3500, consisting entirely of personal property. That none of the said real estate belonging to the said Jeanette Fensky and described in the complaint was inventoried in the said estate, nor was the same distributed by the said Superior Court of said Los Angeles county.

That the said J. H. Merriam was fully advised of the property belonging to the said Jeanette Fensky at the time of her death and had full knowledge of the rights of the complainants herein.

That after the estate had been closed the said J. H. Merriam was requested to continue the administration of the said estate, but failed, refused and neglected so to do.

That all the estate of Ferdinand Fensky was at the time of his death his separate property, and as such, on the death of his widow, the estate in her hands descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky.

That plaintiffs have received nothing from the estate of their said deceased brother Ferdinand Fensky, excepting said sum of $1000 each.

That neither complainants ever had any notice of the fraud so perpetrated upon them until July, 1912; that thereupon they commenced an investigation which developed the facts alleged in the said complaint.

The above are the important material allegations contained in the bill of complaint, all of which, together with sufficient details, are fully set out in the complaint.

The complaint prays that an account be taken of all the property of the said Ferdinand Fensky, deceased;

That the pretended deeds of release and of claim executed by these plaintiffs to the said Jeanette Fensky be declared fraudulent and void and of no effect, and that an account be taken of the estate of said Jeanette

Fensky, and the sources from which the same was derived.

That the deeds of Jeanette Fensky to the other defendants be decreed null and void and that the defendant J. H. Merriam be required to account to the plaintiffs for their distributive share of the said estate of Jeanette Fensky, and for such other, further and general relief as to the court may seem equitable and just.

All the defendants except Schmidt, Katzung, Loveland and Ferguson, appeared and moved to dismiss the complaint on the grounds that it appeared on the face of the complaint by plaintiffs' own showing:

1. That plaintiffs were not entitled to the relief prayed for in the complaint.

2. That the court had no jurisdiction to hear the suit, nor of the subject matter of the suit.

3. That the complaint is wholly without equity.

4. That there is a non-joinder of parties defendant, in that M. T. Campbell was not joined as a party defendant therein.

5. That there is a misjoinder of causes of action.

6. That the alleged cause of action of plaintiffs is barred by subdivision 4 of section 338, and section 343, of the Code of Civil Procedure of the state of California.

7. That the causes of complaint are stale, and that so long a time has passed since the matters complained of occurred that it would be contrary to equity and

good conscience for the court to take cognizance thereof.

8. That the right of action set up in the complaint did not accrue within five years before the bringing of the suit; nor within four years before the bringing of the suit, nor within three years before the bringing of the suit.

9. That the complaint is uncertain, unintelligible and ambiguous for the reason that it cannot be ascertained therefrom which papers or records in the administration proceedings in California upon the estate of Jeanette Fensky, deceased, failed to disclose the truth, nor in what respects they so failed; or which statements contained in the inventory returned in the administration proceedings in California upon the estate of Jeanette Fensky were believed by plaintiffs, or which statements were false, or what were the facts or circumstances showing them to be so; that it cannot be ascertained therefrom what representations, if any, were alleged to have been made by defendants to the plaintiffs; nor which representations were believed by plaintiffs; nor which representations were false, or what facts or circumstances showed them to be so. [See pages 35 to 39 and 40 to 43, inclusive, of transcript.]

The defendants Amanda Katzung, Corrine Loveland and Don Ferguson, on motion of their attorney, Wm. J. Hunsaker, asked, and on the consent of attorney for plaintiffs, were allowed by the court ten days after the ruling of the court on the motion of the other defendants to dismiss the bill of complaint

within which to file their answer to said bill of complaint.

After argument by counsel for the various parties, the court, on the 14th day of August, 1915, made an order granting the motion of defendants to dismiss the said action [see Tr. pp. 48 and 49]; and on the 7th day of September, 1915, pursuant to said order, made and entered a decree of dismissal [see Tr. pp. 54 and 55], from both of which order and decree of dismissal plaintiffs have appealed.

At the time of the making of the order granting the motion to dismiss, the learned trial court filed an opinion in the case, in which his reasons for granting the motion are set out, and to which this Honorable Court is referred. [See Tr. pp. 49 to 54, inc.]

While the opinion states but few reasons for granting defendants' motion, we shall assume here that the court held with defendants on all grounds set out.

SPECIFICATIONS OF ERROR.

We hold that the honorable trial court erred in making the order of August 14th, 1915, dismissing plaintiffs' bill of complaint, and in making and entering the decree on September 7th by which such dismissal was formally ordered, adjudged and decreed, and have specified the making of this order and decree an error on the part of said court for the following reasons:

1st. The complaint is sufficient and states a cause of action for fraud, and under the allegations contained therein the plaintiffs are clearly entitled to the relief prayed for.

2nd. The court had jurisdiction over the persons named as and made parties to the action in the bill of complaint, and also over the subject matter of the complaint.

3rd. The matters complained of in the complaint were not stale and the court could take cognizance of such matters without violation of the principles of equity, and the plaintiffs were not guilty of *laches,* nor was the cause of action barred by the statutes of limitation of the state of California mentioned in defendants' motion to dismiss.

4th. The fraud complained of by plaintiffs was extrinsic in character and not intrinsic.

5th. There was no misjoinder of parties or of causes of action.

6th. The complaint was not ambiguous, uncertain or unintelligible.

Under the assumption that the trial court held with defendants on each and every ground named in their motion to dismiss, we assigned as error in our formal assignment of errors, the ruling of the court on each individual ground. [See Tr. pp. 60 and 61.] In our brief, however, we shall condense and eliminate wherever possible, and shall specify as errors, on which we rely, only such as we deem material.

In addition to the making of the order and rendering the formal decree of dismissal, heretofore specified as error, we hereby specify the following rulings and

holdings of the trial court as error on which we rely for the reversal of this decree:

1. That the complaint is insufficient and does not state a cause of action for fraud, and that plaintiffs are not entitled to the relief prayed for.

2. That the court has no jurisdiction of the parties to or subject matter of the suit, nor jurisdiction to hear and determine the suit.

3. That the matters complained of are stale, and that plaintiffs are guilty of *laches*.

4. That the cause of action set up in the bill of complaint is barred by the statute of limitation of the state of California, to-wit: Subdivision 4 of section 338 of the Code of Civil Procedure, and section 343 of the Code of Civil Procedure.

5. That the fraud complained of by plaintiffs is intrinsic in character and not extrinsic.

6. That there is a misjoinder of the parties and of the causes of action.

7. That the complaint is ambiguous, uncertain and unintelligible.

And we shall confine our argument to these specified errors.

Complaint States Cause of Action and Complainants Are Entitled to Relief.

It is universally the rule, supported by the great weight of authority, that in order to state a cause of action for fraud a complaint must allege in effect,

as follows: That material representations, with intent to deceive and defraud, were made by the parties against whom the fraud is charged; that these representations were false; that the complainants believed and relied upon the same; that by reason of complainant's belief and reliance thereon he was induced to act or alter his condition and was thereby damaged. Or, in the language of the court, in the case of Watson v. Poulson, 15 Jurist, 1111, which language is adopted by the United States Supreme Court in the case of Ming v. Woolfolk, 116 U. S., page 602:

> "The telling of an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage."

It is also generally held that concealment of essential facts which the defrauded party is entitled to know, is equivalent to fraudulent representation.

See Stewart v. Wyoming Cattle Ranch Co., 128 U. S. 383, in which case, at page 388, the court says:

> "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the

> atcion is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

Every essential allegation necessary to state a cause of action for fraud is contained in the bill of complaint in the action at bar, and not a single element of fraud is lacking. The complaint clearly and positively alleges that the said Jeanette Fensky and the said M. T. Campbell each returned false inventories in the estate of Ferdinand Fensky. That they purposely concealed a great part of the assets belonging to the estate; that they represented to the complainants that the estate of Ferdinand Fensky consisted only of property situate in California of the value of about $6000, and of property in the hands of Campbell amounting to about $20,000, and that of this property the widow, Jeanette Fensky, was entitled to one-half, and that the remaining half only was subject to distribution among the other heirs at law of the intestate, and that of this property the widow would receive about $10,000 from property in the hands of Campbell and about $3000 of property in her hands in California, and that in addition thereto she was entitled to the real estate described in the inventory filed by Campbell in the Probate Court of the state of Kansas, and that the share of said estate which each of said complainants ultimately might be entitled would not exceed the sum of $1000.

That all these representations were false, and known to be false by Jeanette Fensky and Campbell, and made with the intent of deceiving the complainants and of inducing them to release and transfer their interests in the said estate of Ferdinand Fensky to Jeanette Fensky for a much smaller sum than their interests were really worth. That in truth and in fact the California real estate owned by the said intestate at the time of his death was worth nearly $30,000 and the personal property in California in the hands of said Jeanette Fensky was of the value of more than $50,000; the entire estate was of the value of $100,000, all of which was well known to the said Jeanette Fensky and the said Campbell, and that each of the complainants were really entitled to receive from said estate, upon a full disclosure and accounting, more than $8000.00. (See paragraphs 10, 11, 12 and 13 of the complaint, pages 10 to 21, inclusive, of Tr.)

The complaint further alleges that at the time the representations were made, the complainants had no knowledge of the actual facts as herein stated, but relied upon the inventories filed and the representations made to them, and believing the same to be true, accepted the offer of the said Jeanette Fensky to release and transfer to her all their interest in the said estate of Ferdinand Fensky for the sum of $1000 each. That the said sum of $1000 was paid from the funds belonging to the estate of Ferdinand Fensky and that if the complainants had known or had any suspicion of the real facts, that neither of them would have executed said releases, but would have demanded their full share of the said estate of Ferdinand Fensky.

(See par. 12 of complaint, pages 16 to 18, inclusive, of Tr.)

From the above allegations it is clearly shown that each of the complainants were damaged by this fraud and deception practiced upon them in the sum of many thousands of dollars.

We cannot see how it can be seriously urged that a full and complete cause of action for fraud has not been stated in the bill of complaint.

The complaint further alleges that after the distribution of the estate of Ferdinand Fensky, which it is alleged consisted entirely of his separate property, Jeanette Fensky, with the money and mortgages received from said estate, purchased real estate in Los Angeles county, California, which is described in the complaint, and that all the property acquired by her prior to her death, was purchased through the money and assets belonging to the estate of her said husband, Ferdinand Fensky. (See par. 13 of complaint, pages 18 to 21, inclusive, of Tr.)

That the said Jeanette Fensky died on July 8th, 1908, and that prior to her death she executed deeds to the property then owned by her to various defendants, but which deeds were not delivered to the grantees therein until after her death.

That the defendant J. H. Merriam was, by the Superior Court of Los Angeles county, appointed administrator of the estate of Jeanette Fensky on petition of defendants Wellke, Katzung and Schmidt; that an inventory in said estate was filed by the said Merriam on September 8th, 1909, alleging that the total assets of said estate was the sum of $3500.00, consist-

ing of $2324.28 as money, and a claim against the defendant Katzung, and a note against defendant Don Ferguson for $1050, and alleged that the sole heirs at law of the said Jeanette Fensky were defendants Eugene Wellke, Alma J. Schmidt and Amanda Katzung.

It is further alleged in the complaint that the said pretended final account was filed by the said defendant Merriam; that he knew of the real estate owned by the said Jeanette Fensky at the time of her death, and he knew that the same was distributable among the heirs at law of Ferdinand Fensky, which included these complainants, and that the defendants Wellke, Katzung and Schmidt had no interest whatsoever, and knew of the execution and non-delivery of the deeds to the various defendants, as alleged in the complaint. That since the filing of said final account and the distribution of the assets of the estate as contained in the inventory, the said Merriam had been requested by complainants to further administer on said estate, but has failed, refused and neglected so to do. (See par. 14 of complaint, pages 21 to 25, inclusive, of Tr.)

It would seem without question that Jeanette Fensky, having obtained the respective shares of the complainants in the estate of Ferdinand Fensky through deception and fraud, that she held the same during her lifetime in trust for complainants, and that at any time after the discovery of the same by complainants she would be accountable to them for the property so obtained.

That one who acquires land or other property by fraud or mistake, or under any circumstances as would

render it inequitable for him to retain it, is in equity regarded as a trustee of the party who suffers by reason of the fraud or other wrong, and who is in equity entitled to the property, is so well settled as to scarcely warrant discussion here. However, we will briefly touch upon this matter and cite a few of the leading cases on the subject.

This principle is recognized by the law of the state of California in the form of a code section, to-wit: Section 2224 of the Civil Code, which reads as follows:

> "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

In all cases of this character a constructive trust will be impressed upon the property so acquired in favor of the person equitably entitled thereto. This will obtain although he may never have had any legal estate in the property.

A leading case on this question is that of Bacon v. Bacon, reported in 150th Cal., at page 477. This action arose through a mistake in the reading and probating a will, in which the word "ten" was, through mistake, read as "two", and by reason of the mistake certain legatees named in the will received $2000 each instead of $10,000, the amount intended to be inserted by the testator, and the suit was brought to obtain a judgment for the unpaid balance of $8000, with

interest; the action being brought some three years after the distribution of the estate. Judgment was rendered for the plaintiffs, from which the defendants appealed. The Supreme Court sustained the decision of the trial court, and in a well considered opinion held that the Superior Court had jurisdiction of the action and power to review the decree of distribution and to declare that the defendants held as involuntary trustees of the plaintiff the property obtained by them through the decree of distribution. In rendering its opinion, the court followed its decision in the case of Sohler v. Sohler, 135 Cal. 323. Other cases so holding are:

Wingerter v. Wingerter, 71 Cal. 105;
Sanford v. Sanford, 139 U. S. 645, and
Estate of Walker, 160 Cal. 549.

The facts in this latter case were as follows: William Walker, a resident of the county of Santa Cruz, died supposedly intestate, and letters of administration were issued, administration upon the estate was duly made and the decree of final distribution was made and entered, and the property delivered to the distributees and the administrator discharged. More than eight months thereafter one Frank D. Enor filed an alleged will of the deceased and petition for its probate. The distributees contested, and in their contest set up the facts above related. A demurrer to the contest was sustained and the will ordered admitted to probate. The distributees appealed from this order.

The Supreme Court sustained the order of the trial court, and a portion of its opinion reads as follows:

"Respondent's position is that neither the order admitting the will to probate, nor the effect of that order, is in any wise an attack, direct or collateral, upon the decree of distribution; that if through accident, fraud, or mistake, the distributees are holding property under the decree, to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees of the rightful owners of the property. This principle is, of course, well established. (Civ. Code, sec. 2224; State v. McGlynn, 20 Cal. 233 (81 Am. Dec. 118); Wingerter v. Wingerter, 71 Cal. 105 (11 Pac. 853); Mulcahey v. Dow, 131 Cal. 73 (63 Pac. 158); Sohler v. Sohler, 135 Cal. 323 (87 Am. St. Rep. 98, 67 Pac. 282); Parsons v. Weis, 144 Cal. 419 (77 Pac. 1007); Bacon v. Bacon, 150 Cal. 481 (89 Pac. 317); Insurance Co. v. Hodgson, 7 Cranch, 332 (3 L. Ed. 362); Case of Broderick's Will, 21 Wall, 503 (22 L. Ed. 599))."

See also:

Estate of Hudson, 63 Cal. 457.

The principle we contend for here is well stated in Pomeroy's Eq. Jurisprudence, at page 155, in which the author says:

"If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the

one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

In Pomeroy's Eq. Jur., 919, it is said:

"Where a probate is obtained by fraud, equity may declare the executor or the other person deriving title under it a trustee for the party defrauded."

In the Estate of Walker (Cal.), 117 Pac. 511, Chief Justice Beatty in his concurring opinion said:

"But if it turns out that there was a will which was suppressed by an heir for the purpose of defrauding devisees or legatees, or, as in this case, lost and undiscovered until after distribution, the remedy of the devisee or legatee against the heir who has received what was his is in equity to charge the heir as his trustee, and to require him to account and to transfer what he has acquired through the fraud, accident, or mistake."

In this connection we would call the attention of the court to the fact that the bill of complaint specifically alleges that at least two pieces of the real estate belonging to Ferdinand Fensky at the time of his death remained in the hands of the widow, Jeanette Fensky, at the time of her death, although she attempted to convey it to the defendant Amanda Katzung by deed which was never delivered. (See subd. C, par. IV of complaint, pages 5 and 6 or Tr.; items 7 and 8, par. XIII of complaint, page 20 of Tr., and par. XIV of complaint. page 24 of Tr.) And also that the balance of the said real estate was acquired by

her by the use of the money obtained from the estate of her said deceased husband. Under these circumstances it must be held that all the property in the hands of Jeanette Fensky at the time of her death was an express trust in her hands for the benefit of these complainants, and the character of this trust could not be changed by investing the funds in other property and taking title thereto in the name of another.

See:

McClune v. Collyear, 80 Cal. 378.

See also Pomeroy's Eq. Jur. Sec. 918, *et seq.*, 2nd ed., in which he says:

> "The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. A court of equity will wrest property fraudulently acquired not only from the perpetrators of the fraud, but, to use Lord Cottenham's language, 'from his children and his children's children,' or, as elsewhere said, from any person amongst whom he may have parceled out the fruits of his fraud. There is one limitation: If the property which was acquired by the fraud has come by transfer into the hands of a bona fide purchaser for valuable consideration and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed and the remedy of the defrauded party, with respect to the property itself is gone; his only

relief must be personal against those who committed the fraud."

In this case at bar the only claim made by the defendants to the property obtained from the estate of Jeanette Fensky is that they are next of kin of the said Jeanette Fensky and by virtue of the undelivered deeds. There is no superior equity in favor of these defendants as against the plaintiffs, hence no such limitation as that mentioned above exists in this case.

As to the defendant J. H. Merriam, the administrator of the estate of Jeanette Fensky, under the California statutes, all of her estate passed into his possession and control, and it was his duty as such administrator to take charge of any estate, either real or personal, belonging to her at the time of her death. It is charged in the bill of complaint that he knew of the condition and circumstances of the deeding of the property to the defendants, and yet he neither took or claimed possession of it.

We submit that under the facts alleged in this complaint that there can be no question but that plaintiffs are entitled to the relief prayed for.

It is alleged that all the property belonging to the estate of Ferdinand Fensky was his separate property, and if so, which here must be assumed to be the facts, then under the laws of the state of California, in effect now and at the time of the death of Jeanette Fensky, governing the distribution of estates of decedents, these complainants, and not the defendants Katzung, Wellke and Schmidt, were the heirs of Fer-

dinand Fensky and entitled to the proceeds of the estate of Jeanette Fensky.

See section 1386, Civil Code of California. Subdivision 8 of this section reads as follows:

> "If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal share to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal share, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.
>
> "If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and

sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."

It is clear that under the second paragraph of this subdivision above quoted, that Ferdinand Fensky having died without issue (see par. 3 of complaint, page 5 of Tr.), and all his property at the time of his death being his separate property, that the same on the death of Jeanette Fensky would go to his heirs and not to the heirs of Jeanette Fensky. This would be true, even though the property, or any part thereof, obtained by Jeanette Fensky from the estate of Ferdinand Fensky had not been procured through the fraud perpetrated upon the complainants.

Furthermore, the property claimed to be owned by defendants Katzung, Schmidt and Wellke, and vested in them through deeds executed by Jeanette Fensky in her lifetime but not delivered until after her death, belongs to the estate of Jeanette Fensky, for it is unquestionably the law universally laid down by all courts, that a deed executed in the lifetime of the decedent but not delivered until after the death of the grantor occurs, vests no estate in the property therein described, in the grantee named therein.

And the property described in these undelivered deeds having been obtained by Jeanette Fensky from the proceeds of the estate of her deceased husband, the same being his separate property, would, under the section of the California Code above quoted, go to the heirs of Ferdinand Fensky, including these complainants.

We do not see how it can be questioned that under the facts alleged in the bill of complaint that the bill states a complete cause of action for an accounting against the defendants, and that the complainants are entitled to the relief prayed for.

The Court had Jurisdiction Over the Parties to and the Subject Matter of the Action and Had Jurisdiction to Determine the Same.

Although the question of jurisdiction is raised in defendants' motion to dismiss, we cannot believe that the contention is seriously made by the learned counsel for defendants, for the bill specifically alleges that the complainants are citizens and residents of the states of Kansas and Nebraska, and that the defendants are citizens and residents of the state of California (see par. 1 of complaint, page 4 of Tr.), that the amount in controversy exceeds in value the sum of $3000 (see par. 2 of complaint, pages 4 and 5 of Tr.); that the real estate in which the complainants assert an interest is situate in the counties of Los Angeles and Orange, state of California, both of which counties are within the jurisdiction of the trial court (see par. 4 of complaint, pages 5 and 6 of Tr., and par. 13 of complaint, pages 18 to 21, inclusive, of Tr., par. 14 of complaint, pages 21 to 25, inclusive, of Tr.).

Unquestionably under section 2 of article III of the Constitution of the United States and the Act of March 3rd, 1875 (see vol. 4 Fed. Stat. Annotated, sec. 265), these facts would give the court jurisdiction over the subject matter of, and parties to, the action, and

also jurisdiction to hear and determine the suit. Owing to the fact that the court is undoubtedly so familiar with both the above mentioned sections of the Constitution and the statute referred to, we deem it unnecessary to do more than to refer to the same.

See also:

Ober v. Gallagher, 93 U. S. 199.

It appears to be the law settled by numerous decisions that federal courts of equity have original jurisdiction over executors and administrators appointed by state probate courts, such executors and administrators being considered as trustees in favor of heirs, creditors, etc., of the estate.

The case of Green's Administratrix v. Creighton, 23 Howard, 90, which was an action to establish a judgment against an administrator and the breach of his administrator's bond, and to seek discovery of the assets and an accounting, the court, in answer to the contention, that the pendency of proceedings in the probate court might oust the jurisdiction of the Circuit Court of the United States, and referring to the case of Suydam v. Broadnax, 14 Pet, 67, said:

> "This court declared that the eleventh section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the Circuit Court of the United States. 'It was certainly intended,' says the court, 'to give to suitors having a right to sue in the Circuit Court remedies co-extensive with those rights. These remedies would not be so, if any proceedings under an act of a state legis-

lature to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the Circuit Court.' "

A leading case on this subject is that of Payne v. Hook, 7 Wallace 425. The facts in this case are not at all unlike the case at bar. In this case a citizen of Virginia filed a bill in equity in the United States courts of Missouri against the administrator and sureties on his bond to obtain for the complainant her distributive share in the estate of her brother. The plaintiff charged gross misconduct on the part of the administrator in making false statements, using money of the estate for his private gain, and, that he "obtained through the use of false representations a receipt in full for her share of the estate, on the payment of a less sum than she was entitled to receive." The object of the bill was to obtain relief against these fraudulent proceedings, and to compel a true account of administration, "in order that the real condition of the estate can be ascertained, and the complainant receive what justly belongs to her."

On demurrer to the bill it was contended that exclusive jurisdiction over disputes concerning the administration of the estates of deceased persons was given by the local law to the probate courts; that there was a defect of parties plaintiff because the other distributees were not made parties; that there was a misjoinder of parties because the sureties of the administrator were joined; and, that the bill was multifarious. The trial court sustained the demurrer and the complainant electing to abide by her bill, it was

dismissed and the case appealed to the Supreme Court. In that court the administrator insisted that exclusive jurisdiction was in the Missouri probate court, and therefore the Federal Circuit Court had no jurisdiction to entertain the controversy.

On appeal the Supreme Court reversed the decree of the Circuit Court and in its opinion, the court, in discussing the jurisdiction of the federal courts in such cases, said:

> "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equity. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitations or restraint by state legislation, and is uniform throughout the different states of the union.
>
> "The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction, and the application of this principle to a particular case

must depend on the character of the case, as disclosed in the pleadings.

"'It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.'"

The opinion and decision in this case is frequently followed, notably in the case of Waterman v. Canal Bank, 215 J. S. 33, in which case, at pages 45, 46 and 47, the court said:

"The complainant, a citizen of a different state, brings her bill against the executor and certain legatees named, who are likewise citizens of another state, and are all citizens of Louisiana, where the bill was filed, except one, who was beyond the jurisdiction of the court, and for the reasons stated in her bill she asks to have her interest in the legacy alleged to be lapsed and the residuary portion of the estate established.

"The controversy is within the equity jurisdiction of the courts of the United States as heretofore recognized in this court, and such jurisdiction cannot be limited, or in any wise curtailed by state legislation as to its own courts. The complainant, it is to be noted, does not seek to set aside the probate of the will which the bill alleges was duly established and admitted to probate in the proper court of the state.

"The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to deter-

mine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in Payne v. Hook, 7 Wall. 425, *supra,* and Ingersoll v. Coran, 211 U. S. 335, *supra.*

"It is to be presumed that the probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the federal court. It has been frequently held in this court that a judgment of a federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of federal right which may be protected in this court."

This case has been followed by the United States Supreme Court in the case of McClellan v. Carland, 217 U. S. 268. In fact, we think that it has been so definitely decided by numerous decisions that the

federal courts have jurisdiction over the parties, subject matter and the question in controversy in cases of the character of the one at bar, that the right of the court to exercise such jurisdiction and in fact that it is its duty to do so, can no longer be questioned.

Complainants Not Guilty of Laches.

One of the grounds contained in defendants' motion for the dismissal of the action is that the causes of complaint are stale, and that so long a time has passed since the matter complained of took place that it would be contrary to equity and good conscience for the court to take cognizance thereof, or in other words, that the complainants are guilty of laches. (See No. 9, page 37, and No. 9, page 42, of Tr.) In the opinion rendered by the honorable trial court this contention of defendants appears to be sustained, the court indicating in the opinion rendered that he considered that many of the matters alleged to have been misrepresented or concealed must have been within the knowledge of the complainants for the reason that they were sisters of the intestate, Ferdinand Fensky, and that one of them resided in the city of Topeka, Kansas, where a portion of his property was located.

We contend that there is nothing contained in the complaint which would justify such an assumption. The mere fact that the complainants were the sisters of the intestate would not justify the presumption that they had any especial knowledge of the affairs of their brother, Ferdinand Fensky, or of the amount of property that he owned, or when he acquired the

same. This might or might not be the case. Neither would the presumption be justified from any allegations in the complaint that complainants knew anything of the nature of the sales of the said property, or as to whether or not any of the same had been sold, or who was in possession of the same, or whether the inventories contained all the property of the deceased.

In the case of Pickens, et al., v. Campbell, et al., an action brought in the District Court of Shawnee county, Kansas, by these same complainants, against the administrator of M. T. Campbell, the person named in the complaint in this action, and his bondsmen to have the settlement of the estate of Ferdinand Fensky set aside for fraud, which action is based upon the identical facts and circumstances as the case at bar. The court passed upon the question of the exercise of diligence by the plaintiffs in learning of the matters alleged to have been concealed, and held that in the absence of anything to excite suspicion on the subject, that it would not be said as a matter of law that the plaintiffs were under an obligation to make such an investigation.

In the district court a demurrer to this action by the defendants was overruled and the defendants appealed. The action of the trial court in overruling the demurrer was sustained by the Supreme Court of the state of Kansas in a recent decision, which we believe has not yet been published in the reports of that state, and as the decision covers many of the points raised in the action at bar, we have, for the

convenience of the court, attached as a supplement to our brief, a copy of this decision. This decision will be found in the advance sheets No. 1, Pac. Reporter of Sept. 4, 1916, vol. 159, p. 21.

Moreover, as alleged in the complaint, a large portion of the property owned by Ferdinand Fensky at the time of his death was located in Los Angeles county, California, several thousands of miles from the residence of these complainants, and particularly there is no reason to presume that they would have any knowledge of the amount, value or condition of this property (see paragraphs 3 and 4 of complaint, pages 5 and 6 of Tr.); and finally, there is a positive allegation contained in the complaint that the complainants had no notice, knowledge or suspicion of the truth respecting the estate of their deceased brother, or of the fraud perpetrated upon them until late in the summer of 1912.

We respectfully submit that under the allegations contained in the complaint, the presumptions indulged in by the trial court are not justified.

It is the general rule that, strictly speaking, laches implies more than mere delay or lapse of time; it requires some actual or presumable change of circumstances or conditions making it inequitable to grant the relief asked. No arbitrary rule exists for determining when a demand becomes stale or when delay will be excused, and the question of laches is generally decided upon the particular circumstances of each case (16 Cyc. 152, par. 3), or as stated in the case of O'Brien v. Wheelock, 184 U. S., at page 493:

> "The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of circumstances during neglectful repose, rendering it inequitable to afford relief."

See also Galliher v. Cadwell, 145 U. S. 368, in which the court holds in addition that the cases in which laches are charges and sustained proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper form.

In the case at bar, as disclosed by the allegations of the complaint, there is nothing to indicate that the enforcement of the claim of plaintiffs would work any inequity as to the defendants; nor is there anything to indicate that during the time that elapsed after Jeanette Fensky obtained the property from the estate of her husband, Ferdinand Fensky, through the releases executed by these complainants, until the bringing of this action, to-wit, from August 3rd, 1904, until July 8th, 1914, there was any such change in the condition of the property or the circumstances of the relationship of the parties, or such change of any character that would make it inequitable to grant the relief prayed for. In fact, we can think of no change that could have taken place that would in any way work any inequity insofar as these defendants are concerned, for none of them were bona fide purchasers for value, but merely acquired the property through

the fact that they were the next of kin of the said Jeanette Fensky, or through the deeds attempting to convey the same to them without any consideration whatsoever. It is universally the rule that where the delay does not appear to have been injurious or prejudicial to the defendants, such delay in itself will not be a bar to relief.

See:

Bacon v. Bacon, *supra*, page 493;
Cahill v. Superior Court, 145 Cal. 47;
Soule v. Bacon, 150 Cal. 497.

Manifestly, the complainants could not be charged with laches until they had some notice or knowledge of the facts constituting the fraud that was perpetrated upon them, and as we have previously pointed out, the complaint specifically alleges that they had no knowledge or suspicion of the truth until late in the summer of 1912, and the complaint also alleges that thereafter they used extraordinary efforts to learn the facts. The complaint alleges further that they had no notice or knowledge that the said deeds to the defendants, executed by the said Jeanette Fensky, were not delivered to the defendants during the lifetime of the said Jeanette Fensky, and that they believed the statements contained in the inventories filed in the estate of the said Jeanette Fensky and of the said Ferdinand Fensky.

Nor is there anything contained in the complaint from which it could be concluded that it was the duty of these complainants as a matter of law to make any investigation as to the estate of Ferdinand Fensky or

of Jeanette Fensky prior to the time that they made the discovery in 1912 which aroused their suspicion. In fact, the complainants had a right to rely upon the inventories filed and the statements made to them by the said Campbell and the said Jeanette Fensky, for a confidential relation is presumed to exist between an administrator and the heirs of the estate, and executors, occupying as they do trust relations toward such beneficiaries and are bound to the utmost good faith in their transaction with such beneficiary.

See:

Bacon v. Bacon, *supra,* at page 489.

Also:

Robins v. Hope, 57 Cal. 497.

In connection with the subject of laches we would call the attention of the court to the rule universally laid down, that length of time is no bar to a trust clearly established or in a case where fraud is imputed and proved, for, as stated in the case of Prevost v. Gratz, 6 Wheat, 481, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense and calls more loudly upon a court of equity to grant ample and decisive relief. In the case of McIntyre v. Pryor, 173 U. S. 37, this phase of the subject of laches is treated in a well considered opinion written by Justice Brown, and many important cases are cited therein, and without quoting from the case we would most respectfully urge the attention of the court to this opinion.

See also:

Meader v. Norton, 11 Wall. 442, at page 458.

Under all the circumstances, we most respectfully submit that the defendants ought not to be heard to say that complainants' bill should be dismissed on the ground of laches.

Statute of Limitations. Not a Bar.

The defendants have set up as ground for their motion to dismiss the Statutes of Limitations of the state of California, especially citing subd. 4, section 338 and section 343 of the Code of Civil Procedure.

Subd. 4, section 338, reads as follows:

Within three years:

"An action for relief on the ground of fraud or mistake. The cause of the action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Section 343 reads as follows:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

It is only necessary to read the said subd. 4 of section 338 in connection with paragraph XVI of plaintiff's complaint to see that there is no merit in the contention of defendants that the cause of action is barred by this statute; for the statute itself states that the cause of action in a case of fraud is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, and the

said paragraph XVI of the complaint positively and definitely states that the complainants had no suspicion of the truth of the matters alleged in the complaint until late in the summer of 1912, and as this action was filed on July 8th, 1914, only two years elapsed from the time the complainants first became suspicious as to the transactions of Jeanette Fensky and of the other defendants until the suit was filed, and in the meantime, as alleged in the said paragraph XVI, the plaintiffs were using their utmost efforts to ascertain all the facts, and they furthermore allege that it was not until early in 1913 that they had any notice or knowledge that the deeds from Jeanette Fensky to the defendants were not delivered during the lifetime of said Jeanette Fensky. Unquestionably, under the allegations of the complaint, the cause of action is not barred by this section of the code.

There are many decisions of our Supreme Court of California supporting our contention as to the application of this section; that of Lataillade v. Orena, 91 Cal. 565, being particularly applicable. This case, to which we shall again have occasion to refer on another point, was a suit for an accounting by a minor against his guardian. It is alleged in the complaint that the guardian from time to time, after April, 1849, until July, 1885, sold property belonging to plaintiff and mingled the funds obtained therefrom with his own, and when his final account was filed he omitted much of the property belonging to the guardian. The defendant pleaded the above subd. 4 of section 338, and in its opinion on this question, the court, at page 577, said:

> "It is urged that the action was not one for relief on the ground of fraud. It is true, the action was for an accounting, but the grievance complained of was, that defendant knowingly received and held moneys in trust for plaintiff, and appropriated the same to his own use, and at all times fraudulently concealed from plaintiff the fact that he had ever received or held any such moneys, or any money in which plaintiff had any interest. It seems to us, therefore, that the averments make a case of the class provided for in the section of the code above cited."

Section 343 above cited provides that all other actions not before provided for in the code must be commenced within four years after the cause of action shall have accrued. The said subd. 4 of section 338 is the only section among those referred to in section 343 that could apply to the case at bar, and as already pointed out, the same does apply and limits the time in which such an action may be brought. Of course, section 343 has no application whatsoever, and this action is not barred by the said section 343.

It is the universal rule laid down by courts of most of the states, and followed by the federal courts, that the defendants' fraudulent concealment of a cause of action will postpone the running of the statute, and is stated in 19th Am. & Eng. Enc. 243, as follows:

> "It has always been the rule in equity that the defendant's fraudulent concealment of a cause of action will postpone the running of the statute until such time as the plaintiff discovers the fraud; the defendant having by his own wrong prevented the plaintiff from instituting his suit,

> will not be permitted to take advantage of his own wrong by setting up the statute as a defense. This rule is provided for by statute in many of the states, but exists in equity courts independent of statutory provisions."

This rule is well settled in the courts of California and of Kansas. See:

Kane v. Cook, 8 Cal. 449;
Currie v. Allen, 34 Cal. 254;
Odell v. Moss, 130 Cal. 352;
Duffit v. Tuhan, 28 Kan. 208;
McMullin v. Loan Association, 64 Kan. 298;
Gafford vs. Dickinson, 37 Kan. 289;
McAdow v. Boten, 67 Kan. 126.

As before stated, this rule is followed by our federal courts in many well considered cases. The one being most frequently quoted being that of Bailey v. Glover, 21 Wall. 342; the action being one by an assignee in bankruptcy against the bankrupt's wife to set aside certain conveyances alleged to be fraudulent. The suit was resisted on the ground that the action was barred by the Statute of Limitations. In delivering the opinion of the court Mr. Justice Miller said (page 347):

> "In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.

> * * * (349) And we are also of opinion that this is founded in a sound and philosophical view of the principles of the Statute of Limitations. They were intended to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until the party committing the fraud could plead the Statute of Limitations to protect it, is making the law which was designed to prevent fraud the means by which it is made successful and secure."

We might quote from many other cases in which this question is so decided by our federal courts, but feel that it is unnecessary, and we will only refer this court to the case of Meader v. Norton, 11 Wall. 442-458.

Unquestionably, the rule that the doctrine of laches never applies to cases of actual fraud also applies where the Statute of Limitations is attempted to be invoked, and where actual fraud exists the running of the statute is stopped until the fraud is discovered.

Fraud Extrinsic and Not Intrinsic.

In support of their motion to dismiss, the defendants at the hearing before the trial court contended that complainants cannot maintain their action for the reason that the fraud complained of is intrinsic and not extrinsic or collateral to the matters determined by the probate court.

This view of the case was taken by the honorable trial court, as shown by his opinion (see pages 51 to 53 of Tr.), and in support of his opinion he cites the following cases:

U. S. v. Throckmorton, 98 U. S. 65;
Pico v. Cohn, 91 Cal. 129;
Hanley v. Hanley, 114 Cal. 690;
Langdon v. Blackburn, 109 Cal. 19;
Fealey v. Fealey, 104 Cal. 354;
Stead v. Curtis, 305 Fed. 439.

As special attention is called to the case of Langdon v. Blackburn in the opinion of the court, we will take time to point out the difference between this case and the case at bar, which differenec is readily distinguishable. In the case of Langdon v. Blackburn, *supra,* the averments of the complaint were as follows: James H. Blackburn died January 27th, 1888, leaving a large estate and as his only heirs two brothers and one sister and children of a deceased sister. Prior to his death the said James H. Blackburn became physically and mentally weak and by reason thereof had no volition, mind or will of his own, and while in this condition the defendants conspired together to defraud the sister, Mira Kirschner, out of her portion of her brother's estate, and to that end they procured and caused to be drawn in legal form, a will, in which no mention was made of said sister, Mira Kirschner, and in which all the property was left to defendants, and while the said Blackburn was physically and mentally incapacitated, placed a pen in his hand and by means of some other person caused

his name to be affixed to the will. That on the death of the said Blackburn, the will was probated by the defendants and the property distributed in accordance with its terms. That at that time the sister, Mira Kirschner, was sixty-five years of age, ignorant as to legal and business matters and resided about 400 miles from the residence of her brother, and shortly after the death of Blackburn the defendants, in order to more effectively carry out their scheme to defraud her, caused her son, one Henry Finley, to visit her and represent to her that her interest in the estate of her deceased brother was the sum of $3000 only. She accepted the said sum of $3000 as her share of the estate. That thereafter the fraud was discovered, and she, being dead, her administrator, Langdon, brought this action, asking that the defendants be adjudged to hold one-fourth of the estate so received by them in trust for the estate of Mira Kirschner, and for an accounting. The trial court sustained a general and special demurrer to the complaint and the appeal was from judgment thereupon entered. The Supreme Court affirmed the order of the trial court in sustaining this demurrer, and in its opinion followed the Broderick will case, reported at 21 Wall. 503, holding that the probate court had complete and effective probate jurisdiction, and that the court of equity had no jurisdiction to interfere or to pass upon the validity of the will. It also held that the fraud alleged to have been perpetrated upon Mrs. Kirschner was not of such an extrinsic or collateral character as to enable the court to grant the relief asked for.

A comparison of the facts and circumstances of the case of Langdon v. Blackburn with those involved in the case at bar, and an analysis of the principles governing each, will readily disclose a vital distinction. In the Blackburn case, to grant the relief prayed for it would be necessary for the court of equity to review the action of the probate court and set aside its decree admitting the will to probate. In the case at bar no such action would be necessary to grant the relief asked. The complainants only ask that the property belonging to the estate of Ferdinand Fensky that was never accounted for by the administratrix, Jeanette Fensky, and which has since come into the hands of these defendants, be now properly accounted for. This is relief of a character that has always been granted by courts of equity of California and by the federal courts.

The principles laid down in the case of Lataillade v. Orena, *supra,* are peculiarily applicable to the case at bar. The facts of this case have already been stated. On the question of jurisdiction of the court of equity to compel the accounting, the court, at page 576, says:

> "The respondent contends that the probate court had exclusive jurisdiction to compel defendant to account as guardian, and that its decree, settling his accounts and discharging him from his trust, was final and conclusive; and in support of this position numerous authorities are cited. This is undoubtedly the general rule applicable to the settlement of the accounts of guardians, executors and administrators, but we do

not think it applicable to a case like this. Here, if the averments of the complaint are true—and they must be assumed to be so for the purposes of this decision—none of the matters now in controversy were passed upon in the settlement, for the reason that the guardian intentionally and fraudulently concealed from the court and his ward the fact that the latter had then or ever had any interest in the property in question. The cases cited state and apply the general rule, but, so far as we have discovered, no one of them goes to the extent of holding that such a settlement can shield a guardian from afterwards being called upon in a court of equity to account for the property so concealed. The rule applicable to the case is correctly stated in Griffith v. Godey, U. S. 89. In that case, Mr. Justice Field, in delivering the opinion of the court, said: 'It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree and administer upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.' (And see Estate of Hudson, 63 Cal. 454; Dean v. Superior Court, 63 Cal. 473; *in re* Cahalan, 70 Cal. 604; Tobleman v. Hildebrandt, 72 Cal. 316.)"

It appears to us that this case, and that of Griffith v. Godey, cited in the opinion, are conclusive upon this question.

A careful analysis of the other cases cited by the honorable trial court in support of its opinion that the fraud complained of was intrinsic will show that in every case referred to some judgment, decree or action of the court previously rendered or taken is sought to be set aside, either actually or in effect, on the ground of some fraud or mistake, and that the facts or matters constituting the fraud were either directly or indirectly passed upon by the court at the time the decree or other action sought to be annulled was rendered.

It will be noted that the complainants in the action at bar do not ask that any decree of court be vacated. They simply ask that the property belonging to the estate of Ferdinand Fensky and Jeanette Fensky that was never inventoried or accounted for, be now accounted for by the holders thereof. No court has ever passed upon the question as to whether or not the property alleged to belong to the estate of Ferdinand Fensky but converted by Jeanette Fensky to her own use and benefit, actually belonged to the estate of Jeanette Fensky or not; nor whether the property attempted to be conveyed in the deeds executed by Jeanette Fensky to the defendants, but not attempted to be delivered until after her death, really belonged to the estate of Jeanette Fensky, or whether or not the grantees under such deeds were accountable to the estate of Jeanette Fensky for the same.

It seems to us that the case at bar comes clearly within the exception laid down in the general rule, as indicated in the opinion of the case of U. S. v. Throckmorton, at page 66, using the language of the court:

> "—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See Wells *res adjudicata,* sect. 499; Pearce v. Olney, 20 Conn. 544; Wierich v. De Zoya, 7 Ill. 385; Kent v. Ricards, 3 Md. Ch. 392; Smith v. Lowry, 1 Johns. (N. Y.) Ch. 320; De Louis et al. v. Meek et al., 2 Iowa 55.
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> "In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

Even though it be conceded for the sake of argument that the fraud perpetrated upon these complainants by Jeanette Fensky in obtaining the releases of the interests of complainants in the estate of Ferdinand Fensky was intrinsic, yet complainants would not be barred from the relief asked for in this action, for these releases could only bind complainants as to the property actually inventoried and distributed in the estate of Ferdinand Fensky and could not in any way affect their rights in the property actually belonging to the estate of Ferdinand Fensky, but which was never distributed through the estate and which was

fraudulently converted by the said Jeanette Fensky to her own use and benefit.

The distinction we contend for here is indicated in the opinion of the court in the case of Fealey v. Fealey, referred to by the honorable trial court in its opinion. In distinguishing between the said case and that of Wickersham v. Comerford, 96 Cal. 433, the court uses the following language:

> "The conclusion we have reached in this case is not at all in conflict with Wickersham v. Comerford, 96 Cal. 433. The action in that case was brought by a creditor of the deceased to annul the order of the probate court setting apart a homestead to the widow of the deceased, the complaint alleging in substance that prior to the death of deceased he and his wife entered into a written agreement for a separation and division of the community property, and that such agreement was completely performed, and that deceased and his wife were at the time of his death living separate and apart, in accordance with the terms of said agreement. Under this state of facts, the widow was not entitled to a homestead out of the estate of her deceased husband. (Estate of Noah, 73 Cal. 583; 2 Am. St. Rep. 829.) But the complaint in that action further alleged that in the petition which the widow filed, asking the court to set apart such homestead for her use, she 'willfully suppressed and concealed from the court' the fact of the existence of the agreement made between herself and husband for a separation, and that she and the deceased were not living together as husband and wife at the time of his death, and that such con-

cealment was made for the purpose of deceiving the court. It was held in that case that this omission being willful and relating as it did to a material fact which ought to have been brought to the attention of the court and submitted to its judgment, was such a fraudulent concealment as would justify a court of equity in annulling the order setting apart the homestead; but it is clear that the fraud which was made the basis of the action and judgment in that case was extrinsic of the judgment or order annulled. In the original proceeding for a homestead under review in that case the court did not even indirectly pass upon the question of the existence or non-existence of the agreement for separation, and that matter not being before the court, was not concluded by the judgment or order in that proceeding; but, as we have seen, the direct question sought to be litigated here, viz., whether the land set apart to defendant as a homestead was or was not community property, was put in issue in the homestead proceeding, resulting in the order here assailed; and the court, upon the evidence submitted to it at the time of making that order, found the fact adversely to the plaintiff's present contention, and this marks the important distinction between the present and the case of Wickersham v. Comerford, 96 Cal. 433."

It appears to us that this case falls clearly within the rule laid down in the cases of Wingerten v. Wingerten, 71 Cal. 105; Lataillade v. Orena, *supra;* Carter v. Shell, 129 Cal. 208; Griffith v. Godey, 113 U. S. 89; Wickersham v. Comerford, 96 Cal. 439; Marshall v. Holmes, 141 U. S. 589.

In this latter case, at page 598, the court says:

"The rules laid down in Barrow v. Hunton were applied in Johnson v. Waters, 111 U. S. 640, 667, and Arrowsmith v. Gleason, 129 U. S. 86, 101. In Johnson v. Waters, this court upheld the jurisdiction of the Circuit Court of the United States, by a decree in an original suit, to deprive parties of the benefit of certain fraudulent sales made under the orders of a probate court of Louisiana, which court, by the law of that state, had exclusive jurisdiction of the subject matter of the proceedings out of which the sales arose. After observing that the Court of Chancery is always open to hear complaints against fraud, whether committed *in pais* or in or by means of judicial proceedings, the court said: 'In such cases, the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment, or decree, it will deprive them of the benefit of it.' In Arrowsmith v. Gleason, the grounds of the jurisdiction of the Circuit Court of the United States to entertain an original suit —the parties being citizens of different states— to set aside a sale of lands fraudulently made by the guardian of an infant, under authority derived from a probate court, are thus stated: 'These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority

> to sell an infant's lands when there are no necessity therefor, but actual fraud in the exercise, from time to time. of the authority so obtained. As the case is within the equity jurisdiction of the circuit court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.' "

It will be seen from the above that the Federal Courts have adopted a liberal policy in relieving a party from the effects of a judgment or decree obtained by fraud than does our state court.

The facts in the case of Wingerter v. Wingerter, *supra,* are similar to those in the case at bar. The plaintiff, who resided in Missouri, was an heir to the estate of his father, who died in Los Angeles county, California. The defendant, as administrator of the estate of the deceased, induced the plaintiff, as heir of his deceased father, through false representations, to convey to the defendant, all his interest in the estate, and afterward procured this interest to be distributed to him by the probate court.

It was held that the plaintiff was entitled to recover; the court, in its opinion, stating, at page 110, as follows:

> "This action was not brought to set aside the deeds and decree of distribution but to charge the defendant as an involuntary trustee for the benefit of the plaintiff of the property which he

fraudulently and wrongfully obtained under them."

In concluding this subject we would again refer to the case of Pickens v. Campbell, in which the court specifically held that the fraud complained of, which was based upon the exact facts and circumstances as the case at bar was extrinsic to the issue determined by the probate court and that equitable action in the district court is an appropriate proceeding for relief.

There is No Misjoinder Either as to Subject Matter or Parties.

The bill of complaint has to do with but one single subject, and that is the recovery by complainants of their distributive share of their brother's estate. The assets which they seek to subject to their claims constitute a trust fund in which the defendants claim an interest and possession adverse to the complainants. True, the defendant Merriam is not alleged to have any of this money in his possession, but his liability as for a conversion of any part which the complainants may not be able to recover makes his presence both proper and necessary. He is charged in the complaint with having aided and abetted the defendants Willke, Katzung, Schmidt, Farnsworth and Loveland with securing possession of this trust fund under deed which they all knew were wholly invalid, and with having distributed among them the property belonging to the estate of Mrs. Fensky. Under such circumstances it is highly convenient and proper that he should be made a party to the action, not only for

the purpose of accounting for the assets of her estate but to make full and complete discovery as to what became of them, and as to why they were concealed.

Defendants also except to the bill on the ground of misjoinder for the reason that M. T. Campbell is not made a party to the action. As no relief whatever is asked against Campbell in this action, we can see no reason why he should be made a party to it. His name is mentioned in the bill merely for the information as to the instrumentality employed by Jeanette Fensky to defraud the complainants, and there is no reason whatever for joining him as a party to the action.

We submit that the bill of complaint is not subject to attack for either a misjoinder or nonjoinder of parties or of causes of action.

Bill of Complaint Not Uncertain, Ambiguous or Unintelligible.

The defendants have set up as a ground for dismissal of the complaint that the same is uncertain, ambiguous and unintelligible for various reasons set out in their motion. We do not deem it necessary to take up the time of this court in discussing this ground of defendants' motion, for the reason that even if the complaint were somewhat uncertain, ambiguous or unintelligible in the respects set out in defendants' motion, these uncertainties are not of enough importance as to be fatal to the complaint. A careful reading of the bill of complaint will readily show that all the material facts necessary to state a cause of action of this character are clearly and distinctly set forth,

and we would call the court's attention to the fact that many of the matters of the complaint claimed to be uncertain by defendants are matters peculiarly within the knowledge of the defendants, and hence under the general rule of pleading, the defendants cannot in such matters challenge the bill of complaint.

See:

Schaake v. Eagle Canning Co., 135 Cal. 485;
Harvey v. Meigs, 17 Cal. App. 365.

As to the alleged uncertainties in the complaint to the effect that it cannot be ascertained therefrom what representations or statements were believed by complainants, nor which were false, we would call the court's attention to the fact that the bill of complaint alleges that complainants had no knowledge of the actual facts alleged in the complaint, but relied on said inventories and said representations made to them and believed the same, and for that reason executed the releases to Jeanette Fensky. [See Tr. par. 12, pp. 16 and 17.] We submit that these allegations could have but one meaning, and that is that complainants believed and relied upon all the representations made to them by Jeanette Fensky and Campbell and the representations contained in the inventories filed in the estates, and that their knowledge of the matters alleged in the complaint was based entirely upon these representations.

We think the bill is sufficiently certain to fully apprise the defendants of the details of the alleged fraud and of all the matters which they are required to answer, and we feel that they should be required to

answer, with full explanation of all the facts and circumstances.

We most respectfully submit that the honorable trial court erred in holding:

That the complaint was insufficient and did not state a cause of action, and that the complainants were not entitled to the relief prayed for.

That the court had no jurisdiction over the parties to, or the subject matter of the action, or to determine the suit.

That the complainants were guilty of *laches,* or that the cause of action was barred by any statute of limitation of the state of California.

That the fraud complained of by plaintiffs was intrinsic and not extrinsic.

That there was a misjoinder of parties or causes of action.

That the complaint was ambiguous, uncertain or unintelligible in any respect.

And finally, in making the order granting defendants' motion to dismiss the bill of complaint and in entering the formal decree of dismissal.

And we further submit that complainants are entitled to investigation and trial of the allegations of their complaint.

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Davis, Kemp & Post and
D. R. Hite,
Attorneys for Complainants and Appellants.

SUPPLEMENT TO BRIEF.

No. 20,095.

Louisa Pickens and Johanna Schutt, appellees, v. M. T. Campbell, revived in the name of Donald A. Campbell, as administrator with the will annexed, etc., *et al.*, appellants.

Appeal from Shawnee county. Division No. 2. Affirmed.

The opinion of the court was delivered by Mason, J.:

Ferdinand Fensky, a resident of California, died intestate and without issue, August 7, 1903. By the laws of that state his heirs were his wife, who was entitled to half his property, five sisters, two brothers and a nephew, who were each entitled to one-sixteenth of it. The widow was appointed administratrix by a California court. M. T. Campbell was appointed administrator in Kansas. He filed an inventory showing something over $20,000 of personal property in his hands. He paid $1000 to each of the collateral heirs named and received from them writings releasing all claims against the estate in favor of the widow. These releases were filed in the probate court, together with a receipt from the widow for the remaining assets shown by the inventory, and in June, 1905, an order was made closing the estate. On May 15, 1914, two of the intestate's sisters brought an action against the administrator and his bondsmen to have the settlement set aside for fraud, and for an accounting of the assets with which he was chargeable. The administrator has since died and his representative has

been substituted. A demurrer to the petition was overruled, and the defendants appeal.

In addition to the facts already stated the petition makes these allegations: Fensky had at one time owned various tracts of real estate in Kansas, including what is known as Fensky's Addition to Topeka, the record title to which stood in his name at his death, but which in fact he had sold, taking notes and contracts for the deferred payments, and holding executed deeds for delivery upon their payment. These notes, contracts and deeds, after the death of Fensky, were sent by the widow to the Kansas administrator, who inventoried none of them, but accounted for them to her. He induced the collateral heirs to execute the releases referred to by falsely representing to them that the Kansas real estate had not been sold and that the entire personal estate left by Fensky amounted to about $20,000. Other notes than those inventoried came into the hands of Campbell as part of the estate and were by him collected, the proceeds being paid to the widow. The plaintiffs never knew of the existence of the contracts of sale or the uninventoried notes until after July, 1912.

1. The defendants maintain that the order of settlement has the force of a judgment and is not open to attack by the method here pursued. The allegation however is that the settlement was procured without an actual accounting as to the claims of these plaintiffs, by the use of a release of all demands against the estate (including that in California as well as that in Kansas) which has been obtained by intentionally false statements concerning facts which affected its

value, particularly by the representation that the Kansas real estate had not been sold by Fensky, in which case the entire title would of course have vested in his widow upon his death. A fraud so accomplished we regard as extrinsic to the issue determined by the probate court and therefore capable of forming a basis for setting aside its order. (See Plaster Co. v. Blue Rapids Township, 81 Kan. 730, 106 Pac. 1079, note 106 Am. St. Rep. 640-642, 645-647.) In the United States District Court for the Southern district of California these plaintiffs brought an action for an accounting founded on the same facts against the successors in interest of Fensky's widow, who had died in the meantime. A motion to dismiss it was sustained. A copy of a memorandum opinion, which appears not to have been published, shows that the court concluded that the fraud complained of was not of such a character as to warrant setting aside the probate court orders, because it was intrinsic with respect to the matter determined, inasmuch as the probate court presumably passed on all the things it would have had to consider if the releases had not been executed, including the extent and value of the estate, excepting that it was not required to decide the exact proportion to which the plaintiffs were entitled. The allegations in the two cases may not have been precisely the same. Here it would appear that the use of the releases, together with the receipt of the widow and domiciliary administratrix, made it unnecessary to make any decision concerning the disposal of the assets with which the ancillary administrator was chargeable. Various Kansas cases support

the view that the order of the probate court is open to attack on the ground of the kind of fraud alleged, and that an equitable action in the district court is an appropriate proceeding for the purpose.

(Klemp v. Winter, 23 Kan. 699;
Gafford, *Guardian,* v. Dickinson, *Adm'r,* 37 Kan. 287, 15 Pac. 175;
Carter v. Christie, 57 Kan. 492, 46 Pac. 964.)

The joinder of the bondsmen as defendants is proper. (Fincke v. Bundrick, 72 Kan. 182, 83 Pac. 403.) The defendants urge that this is a collateral attack on the judgment, because other relief is sought than its vacation, and quote in support of the contention this and similar tests: "If the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, the attack upon the judgment is collateral." (23 Cyc. 1063.) The meaning obviously is that in order for an action to constitute a direct attack on a judgment, its vacation must be sought as an end in and of itself and not as a mere incident to something else. The circumstance that additional relief is asked cannot affect the matter.

The statute seems to contemplate that the net proceeds of the property of a non-resident intestate administered in this state shall in accordance with the usual practice be paid over to the foreign administrator. (Gen. Stat. 1909, 3610.) But while the heirs may have had no absolute right to a distribution at the hands of any one except the domiciliary administratrix, the funds in the hands of the anciliary ad-

ministrator were subject to the control of the court and might in some circumstances have been ordered paid directly to the final beneficiaries.

(13 A. & E. Encycl. of L. 938, 940;
18 Cyc. 1235;
11 R. C. L. 441.)

A direction to turn over all the assets to the widow, although she was also the domiciliary administratrix, if procured by the use of a release obtained by fraud, cannot be a bar to a further inquiry as to their proper disposition. The petition states grounds sufficient to justify setting aside the order of final settlement by virtue of its allegations of intentional fraud. (23 Cyc. 1022.) Ordinarily the right to the purchase price of land, contracted to be sold but not conveyed at the time of the vendor's death, passes to his personal representative and not to his heirs.

(Gilmore v. Gilmore, 60 Kan. 606, 57 Pac. 505;
18 Cyc. 187;
11 R. C. L. 124;
Note, 57 L. R. A. 646.)

The petition contains nothing to suggest a different rule here, but if the evidence should show that the administrator believed that the notes therein referred to followed the rule of real estate and became the property of the widow, no statements made by him in good faith by reason of that belief, however incorrect from a legal point of view, would warrant a reopening of the administration. The extent of recovery if the allegations of the petition should be proved is not involved in this proceeding.

2. The defendants assert that the action (as to the sureties at least) is one on the bond of the administrator and has been barred by the five-year statute of limitation. (Civ. Code, sec. 17, subdiv. 50.) The plaintiffs contend that it is one for relief on the ground of fraud, properly brought within two years after the discovery. (Civ. Code, sec. 17, subdiv. 3.) To bring it within the latter classification the fraud must be the basis of the action. (25 Cyc. 1178, 1182.) The mere fraudulent concealment of facts giving rise to a right of action for damages for the violation of a contract has been held by this court not to suspend the statute. (Railway Co. v. Grain Co., 68 Kan. 585, 75 Pac. 1051.) Elsewhere there is a difference of judicial opinion as to whether such conduct will postpone the running of the statute against an action at law (25 Cyc. 1214), while there is a general agreement that such is the effect with reference to a suit in equity. (19 A. & E. Encycl. of L. 243; 25 Cyc. 1214.) In this state the statute of limitations applies equally to legal and equitable cases. (Chick *et al.* v. Willets, 2 Kan. 384.) In the present action however the requirement that the fraud practiced must be the foundation to the action is fully met. The relief asked is essentially the setting aside of the releases because they were procured by fraud, the vacation of the settlement which was based upon them, and the restoration of the rights thereby denied. If the running of the statute was suspended as to the administrator it was suspended as to the bondsmen as well. (25 Cyc. 1186.)

3. The argument is also advanced that the facts pleaded show that by the exercise of reasonable diligence the plaintiffs could have learned of the matters alleged to have been concealed, and therefore must be deemed to have had constructive knowledge of them. The plaintiffs allege in general terms that they had no means of knowing the facts, and we do not think any of the details stated are in necessary conflict with that allegation. It is suggested that inquiry of the purchasers of lots in the Topeka addition would have disclosed that they had bought them from Fensky and were indebted to him for the purchase price at the time of his death, but in the absence of anything to excite suspicion on the subject it cannot be said as a matter of law that the plaintiffs were under an obligation to make such an investigation. In the federal case referred to the court reached a different conclusion in this regard, which obviously resulted from a less liberal interpretation of the allegations of a pleading than the practice in this state requires where the attack is by demurrer.

4. The contention is made that the petition is demurrable because it merely alleges that the plaintiffs did not know of the facts pleaded until July, 1912, and does not state how the discovery came about. The general rule appears to be that such a statement is required. (25 Cyc. 1418; Hardt v. Heidweyer, 152 U. S. 547.) But the contrary practice obtains in some of the states, including Kansas. (K. P. Ry. Co. v. McCormick, 20 Kan. 107; 25 Cyc. 1419.)

The order overruling the demurrer is affirmed. All the justices concurring.